90-186

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RANDALL HAGE JAMAIL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHERE HIS POST-ARREST, POST-*MIRANDA* REQUEST FOR COUNSEL WAS INTERPRETED AS AN IMPLIED BREATH TEST REFUSAL TO BE INTRODUCED AS SUBSTANTIVE EVIDENCE OF PETITIONER'S GUILT WHERE THE RECORD DEMONSTRATES THAT PETITIONER WAS NEVER TOLD THAT THE *MIRANDA* WARNINGS DID NOT APPLY TO THE BREATH TEST REQUEST AND WHERE PETITIONER WAS AFFIRMATIVELY TOLD THAT THE *MIRANDA* WARNINGS APPLIED TO QUESTIONS RELATED TO THE OFFENSE OF DRIVING WHILE INTOXICATED.

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PETITION FOR WRIT OF CERTIORARI

Randall Hage Jamail, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Texas Court of Criminal Appeals in the above-entitled proceeding.

OPINIONS BELOW

Jamail v. State, 787 S.W.2d 380 (Tex. Crim. App. 1990), is reprinted in Appendix A, attached hereto. Denial of motion for rehearing is reprinted in Appendix B, attached hereto. *Jamail V. State*, 731 S.W.2d 708 (Tex. App.—Houston [1st Dist.] 1987), is reprinted in Appendix C, attached hereto.

JURISDICTION

The Texas Court of Criminal Appeals, Texas' court of last resort in criminal cases, had appellate jurisdiction over the judgments of the court of appeals and the county criminal court at law in this cause pursuant to Tex. R. App. Proc. 200(a). Its judgment and opinion were entered herein on March 21, 1990. On April 25, 1990, the Texas Court of Criminal Appeals denied Petitioner's timely motion for rehearing. Consistent with this Honorable Court's Rule 13, this petition is timely if filed on or before July 24, 1990.

This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1257, which allows this Court to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of . . . the United States."

CONSTITUTIONAL PROVISION AT ISSUE

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

TEXAS STATUTE AT ISSUE

"If a person refuses a request by an officer to give a specimen of breath or blood, whether the refusal was express or the result of an intentional failure of the person to give the specimen, that fact may be introduced into evidence at the person's trial." Tex. Rev. Civ. Stat. Ann. art. 6701*l*-5, sec. 3(g) (Vernon Supp. 1990).

STATEMENT OF THE CASE

Petitioner was arrested on May 30, 1986, by Officer Self of the Houston Police Department for driving while intoxicated, first offense. After arrest and transport to the police station, but prior to indictment, information, or complaint, he was taken to a room to be videotaped. A paraphrased transcript of the videotape is reprinted as Appendix D, and is attached hereto for the Court's convenience. At the beginning of the videotape, Officer Self informed Petitioner of his *Miranda* warnings. Petitioner immediately requested to terminate the interview, but the officer continued to give the warnings, telling Petitioner the warnings *only applied to questions relating to the crime*, which he pointed out were posted on the wall.

Petitioner repeatedly requested to terminate the interview, and to be allowed a private consultation with an attorney. The officer allowed Petitioner to attempt to telephone an attorney—all efforts were unsuccessful. The officer stated he would allow Petitioner to perform the motor skills tests and reminded Petitioner that his *rights only applied to the questions that related to DWI* which were posted on the wall. At this point, Petitioner stated that he was not refusing, but merely wanted his attorney present. He then acquiesced and said he would do anything the officer asked.

Officer Self continued demonstrating motor skills tests. Petitioner asked for an attorney several more times and tried again to contact his attorney. *The officer stated that the requests for an attorney were refusals.* Petitioner again stated that he was not refusing, but wanted an attorney. The officer continued the motor skill tests and petitioner complied by performing—all the while requesting an attorney.

Thereafter, the officer told petitioner he wanted to ask questions that *related to the crime of DWI* and again referred to the writing on the wall. At this time in the proceeding, approximately fifteen minutes had elapsed since the beginning of the video-interview.

During the remaining few minutes of the interview, Petitioner again requested an attorney and refused to answer the offense related questions. The officer again told him he need not answer! Petitioner again requested to terminate the interview. The officer then asked Petitioner another offense related question: "would you take a breath test?" and Petitioner again responded, "No, not without an opportunity to call an attorney." The officer then informed Petitioner orally of the DWI statutory warning on breath test refusal.[1] The officer never told

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1. The statute, Tex. Rev. Civ. Stat. Ann. Art. 6701*l*-5, § 2(b)(c), (Vernon Supp. 1990), requires as follows: "(b) Before requesting a person to give a specimen, the officer shall inform the person orally and in writing that if the person refuses to give the specimen, that refusal may be admissible in a subsequent prosecution, and that the person's license, permit, or privilege to operate a motor vehicle will be automatically suspended for 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as as a result of the arrest. If the officer determines that the person is a resident without a license or permit to operate a motor vehicle in this state, the officer shall inform the person that the Texas Department of

Petitioner his *Miranda* warnings did not apply to the breath test decision. Petitioner never expressly refused.

On August 21, 1986, the Honorable J. R. Musselwhite, Judge of Harris County Criminal Court at Law No. 6, having reviewed the videotape of Petitioner and Officer Self, overruled Petitioner's motion to suppress the breath test refusal. On appeal to the Texas Court of Appeals, Petitioner's due process claim was rejected on the basis that Petitioner had no right to counsel at the time of his requests and *no testimony* had been presented to indicate Petitioner was confused or misled. *Jamail v. State*, 731 S.W.2d 708 (Tex. App.—Houston [1st Dist.] 1987).

In his petition for discretionary review to the Texas Court of Criminal Appeals, Petitioner brought six grounds for review. The Texas Court of Criminal Appeals granted review on only two issues: 1) due process; and, 2) right to counsel. The court affirmed Petitioner's conviction, holding, *inter alia,* that the defendant's reasons for refusal are irrelevant under Texas' statute and that post-arrest, post-*Miranda* silence differs from post-arrest, post-

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Public Safety shall deny to the person the issuance of a license or permit for a period of 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as a result of the arrest. The officer shall inform the person that the person has a right to a hearing on suspension or denial if, not later than the 20th day after the date on which the notice of suspension or denial is received, the department receives a written demand that the hearing be held.

(c) The officer shall provide the person with a written statement containing the information required by Subsection (b) of this section. If the person refuses the request of the officer to give a specimen, the officer shall request the person to sign a statement that the officer requested that he give a specimen, that he was informed of the consequences of not giving a specimen, and that he refused to give a specimen."

Miranda requests for counsel in the context of *Wainwright v. Greenfield*. The Court also held that, upon review of the videotape introduced in the trial court, Petitioner was not misled or confused as to the application of his *Miranda* rights to the breath test decision. *Jamail v. State*, 787 S.W.2d 380 (Tex. Cr. App. 1990).

REASONS FOR GRANTING THE WRIT

The Texas Court of Criminal Appeals has held that due process is not offended by the introduction of a defendant's post-arrest, post-*Miranda* request for counsel as evidence against him where police imply that said right is applicable to a breath test decision.

1. The decision that a state's interpretation of its evidentiary statute will prevail over the implied assurances of *Miranda* and *Greenfield* resulting in the prosecution's use of a request for counsel as substantive evidence of guilt is an important question of federal constitutional law left open by this Honorable Court in *South Dakota v. Neville*. In this respect, the Texas Court of Criminal Appeals missed the point of Petitioner's argument. This Court should settle this question.

2. Additionally, in deciding the instant case, the Texas Court of Criminal Appeals has distinguished between right to counsel and right to silence in relation to the *Miranda* warnings, i.e., silence cannot give rise to a guilty inference but a counsel request can. The decision is in conflict with *Wainwright v. Greenfield,* which says a request for counsel cannot be used to infer guilt. Thus, this Honorable Court should review the decision.

QUESTION PRESENTED (RESTATED)

WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHERE HIS POST-ARREST, POST-*MIRANDA* REQUEST FOR COUNSEL WAS INTERPRETED AS AN IMPLIED BREATH TEST REFUSAL TO BE INTRODUCED AS SUBSTANTIVE EVIDENCE OF PETITIONER'S GUILT WHERE THE RECORD DEMONSTRATES THAT PETITIONER WAS NEVER TOLD THAT THE *MIRANDA* WARNINGS DID NOT APPLY TO THE BREATH TEST REQUEST AND WHERE PETITIONER WAS AFFIRMATIVELY TOLD THAT THE *MIRANDA* WARNINGS APPLIED TO QUESTIONS RELATED TO THE OFFENSE OF DRIVING WHILE INTOXICATED.

ARGUMENT

The Texas Court of Criminal Appeals has interpreted its DWI breath test refusal statute to include requests for counsel in the gradation of conduct that constitutes a refusal, i.e., an inference of guilt against the accused. In spite of the fact that a defendant is not entitled to assistance of counsel when deciding whether to take the test, this application of Texas' breath test refusal statute violates Petitioner's right to due process because it allows the State to argue to a jury to infer guilt from the request for counsel simply by labelling it a refusal and/or it forces the accused to attempt to rebut that inference by introducing evidence that he invoked his right to counsel and that the police interpreted that to be a refusal. It is absolutely irrelevant to Petitioner's contention herein that he was not entitled to counsel or that counsel was not present as the

Texas Court of Criminal Appeals suggested. The fact remains that Petitioner not only relied on the assurances implicit in the *Miranda* warnings, but also, on the actions of the arresting officer in informing him that said *rights did apply to questions that related to DWI.*

The question of whether a DWI defendant's federal right to due process of law was violated by the trial court's failure to suppress an alleged refusal to submit to an Intoxilyzer breath test under the facts of this case is one of first impression for this Honorable Court. When the trial court failed to suppress Petitioner's alleged refusal it effectively equated his requests for counsel/silence to a refusal, as did the arresting officer, and thereafter allowed the State to use his invocation of those rights to infer guilt. Such a holding by the trial court violated Petitioner's due process rights because a request for counsel cannot be used to infer guilt. This is especially true where, as in this case, the officer misled and/or confused Petitioner into believing his rights to counsel/silence extended to the breath test decision.

The Texas Legislature has provided that:

> If a person refuses a request by an officer to give a specimen of breath or blood, whether the refusal was express or the result of an intentional failure of the person to give the specimen, that fact may be introduced into evidence at the person's trial.

Tex. Rev. Civ. Stat. Ann., Art. 6701*l*-5, sec. 3(g) (Vernon Supp. 1990).

The silent underpinning of the aforementioned evidentiary statute is that the refusal is ostensibly relevant because it tends to show the refusing person's state of mind, i.e.,

that he had the opinion he was guilty and, therefore, refused the test because he believed its result would show scientific evidence of guilt. Stated another way, the statute silently and, on the facts of this case, impermissibly provides for the introduction of a DWI suspect's refusal to be admitted in evidence to demonstrate his guilty thinking mind, apparently to be used against him, because a person who believed himself innocent would have submitted to testing to prove himself innocent and because he had nothing to fear. *See People v. Suddith,* 421 P.2d 401 (Cal. 1966), *cert. denied,* 389 U.S. 850 (1967) and *South Dakota v. Neville,* 459 U.S. 553, 103 S. Ct. 916 (1983). The jury thus may infer guilt where there is evidence the citizen accused refused to submit to a breath test.

On the other hand, it is well settled that the invocation by an accused of his constitutional rights to silence/counsel after he has been arrested and advised of his *Miranda* warnings cannot be used as evidence against him without violating his right to due process and fundamental fairness. *Doyle v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). In *Wainwright v. Greenfield,* 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986), this Court refused to relax the dictates of *Doyle* and reaffirmed the rule that "breaching the implied assurances of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Greenfield,* 474 U.S. at 291, 106 S. Ct. at 638-39. The Court rejected any distinction between the use of silence in the case in chief as affirmative proof to overcome an insanity defense and its use for impeachment, stating:

> "In both situations, the State gives warnings to protect constitutional rights and *implicitly promises that*

> *any exercise of those rights will not be penalized.* In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction." *Greenfield,* 474 U.S. at 292. (emphasis added).

In regard to the facts of the instant case, it is useless to attempt to differentiate, as the Texas Court of Criminal Appeals did, between the right to silence and the right to counsel in the context of the *Miranda* warnings. *Miranda* requires that a citizen be advised of both. Both are of constitutional dimension, and in the context of the *Miranda* warnings, they are mutually dependent and inseparable to the lay person who invokes them.

Clearly, then, a refusal to submit to chemical testing, premised upon a counsel request, has no probative value with respect to guilt or innocence and its admission into evidence is offensive to due process of law. Therefore, a refusal premised upon a counsel request could do no more than confuse and mislead the jury causing prejudice to the Petitioner's due process right. In the case at bar, the trial court's allowance of the refusal to be admitted into evidence would only serve to invite a jury to be confused or mislead into speculating as to why he asked for his attorney. Such risky speculation is clearly prejudicial to Petitioner. Accordingly, due process required the suppression of Petitioner's alleged refusal.

The instant case is indistinguishable from the rationale in *Doyle* and *Greenfield.* Although, at first glance, *South Dakota v. Neville* may seem to be controlling, the only similarity between that case and the instant case is the fact that no breath test was administered to a DWI arrestee. This Court in *Neville* rejected a due process challenge there—contrasting the implicit assurances of

the *Miranda* warnings with the express warning that a breath test refusal was not a " 'safe harbor', free of adverse consequences", and noting that the right to refuse the test was granted by statute. *Neville,* 459 U.S. at 566, 103 S. Ct. at 924. In *Neville,* however, the defendant had previously waived his right to counsel and agreed to talk without a lawyer present. *See, Neville,* 459 U.S. at 555, 103 S. Ct. at 918. Thus, the defendant did not refuse the breath test on counsel grounds and clearly did not believe that the *Miranda* warnings applied to that decision.

Petitioner here also claimed that his right to due process of law was violated by the admission of his alleged refusal because his arresting officer not only mixed the *Miranda* rights with the breath test decision, but also, misled and confused him into believing that the right to counsel applied to his breath test decision. The videotape admitted into evidence shows the police clearly misleading him.

The videotape of the post-arrest interview of Petitioner shows that he was apprised of his *Miranda* warnings almost immediately. Further, when he then requested to terminate the interview, the officer told him his rights to counsel/silence applied *only to questions about the DWI offense itself* and indicated interview questions posted on the wall. This exchange arguably made clear to Petitioner that his rights to counsel/silence did not apply to the motor skills tests which the officer subsequently demonstrated. However, when Officer Self allowed Petitioner to make several unsuccessful attempts to contact an attorney, any distinction as to when those rights applied became blurred. Thereafter, Petitioner performed motor skill tests.

It is the subsequent stage of the proceeding that brings to focus the violation of Petitioner's due process rights

because it is there the officer intertwined the *Miranda* rights with a breath test request. In particular, Officer Self then told Petitioner that he was going to ask those *questions related to DWI* and again referred to the questions on the wall. Petitioner requested to terminate the inerview and Officer Self *immedately asked him to provide a breath sample*. Petitioner continued to request an attorney. The officer then read the Texas statutory DWI warnings to Petitioner, including that a refusal could be used against him in subsequent proceedings and that he was subject to automatic suspension of his driver's license. Petitioner then expressly stated, "No, not without an opportunity to call an attorney."

The requesting officer himself equated a counsel request to a breath test refusal after the officer's own words and actions implied to the Petitioner his *Miranda* rights applied to the decision whether to take the test. Any admission at trial of that "refusal" should be precluded unless the officer first explained to the defendant that the request for an attorney did not apply to the breath test decision.

This Court, in *Neville*, recognized that "[t]he situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states 'I refuse to take the test,' to the respondent here, who stated 'I'm too drunk, I won't pass the test.'" *Neville*, 459 U.S. at 561-62, 103 S. Ct. at 921. This case, however, presents a situation which does not fall into the range of conduct which constitutes a refusal. Although Petitioner did not submit to the breath test, that alone is not enough to constitute a refusal for the purpose of inferring his guilt.

It is clear, in the instant case, that the only time Officer Self clearly switched gears was when he said, in effect,

"This is where the *Miranda* warnings, and your right to refuse, apply." Within the next twenty-three seconds, Petitioner had refused to take the breath test. Not until after that refusal did Officer Self read the warnings required by statute. Notably, and most importantly, Officer Self did not tell Petitioner that his rights did not apply to the decision whether to take the test. At least one jurisdiction requires that clarification. *See Commonwealth v. O'Connell,* 555 A.2d 873 (Pa. 1989). *See also, Wright v. State,* ____Ark____, ____S.W.2d____ (1986) (Ark. Sup. Ct. No. CR86-11, 2/18/86); *Swan v. Department of Public Safety,* 311 So.2d 498 (La. App. 1975); *State v. Severino,* ____Haw.____, 537 P.2d 1187 (1975); *Raine v. Curry,* 45 Ohio App.2d 155, 341 N.E.2d 606 (1975); *Calvert v. State Department of Revenue, Motor Vehicle Division,* 184 Colo. 214, 519 P.2d 341 (1974); *Wiseman v. Sullivan,* 190 Neb. 724, 211 N.W.2d 906 (1973); *State Department of Highways v. Beckey,* ____Minn.____, 192 N.W.2d 441 (1971); and, *Rust v. Department of Motor Vehicles, Division of Driver's Licenses,* 73 Cal.Rptr. 366 (Fourth District 1969).

Petitioner, from the beginning, had been impliedly assured that his invocation of the *Miranda* rights would not be used against him. Indeed, from the officers words and actions, and according to Texas' DWI law that a person can be convicted on the issue of being intoxicated on the basis of a chemical test alone, *see,* Art. 6701*l*-1 (a)(2)(B), and (b),[2] the officer commingled the *Miranda* rights to the breath test by telling the Petitioner

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2. DWI is defined under Texas law as "a person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place. . . ." Intoxication is defined as .10 alcohol concentration or more. Art. 6701*l*-1(a)(2)(B) and (b) (Vernon Supp. 1990).

that they attached to questions which related to DWI—clearly, a breath test request relates to the offense.

Even assuming Petitioner understood that the *Miranda* rights did not apply to the first fifteen minutes of the interview, Officer Self clearly demarcated the point in the interview where those rights began to apply. In spite of the oral warning required by statute, the officer never told Petitioner that his *Miranda* rights *did not thereafter apply*. On the basis of these facts, it cannot be debated that a request for a breath test does not relate to the DWI offense as a reasonable person would not think otherwise.

Moreover, it is unreasonable to attribute to a lay person the knowledge and awareness of what constitutes custodial interrogation. This Court has stated that "the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. 384 U.S. at 764, 86 S. Ct. at 1832." See *Neville*, 459 U.S. 553, 561. Unlike *Neville*, the warnings and questions in the instant case are especially confusing because the Petitioner almost immediately invoked his right to counsel and continued to do so throughout the twenty minute interview.

The "refusal" was, in fact, a request for an attorney at a time when it was not made clear to Petitioner that he had no such right. It is Petitioner's position herein that Officer Self affirmatively mixed the *Miranda* warnings with the breath test decision. Moreover, the officer affirmatively misled and/or confused Petitioner into believing the right to counsel was applicable to the breath test decision. Under these facts, to allow Petitioner's conduct to constitute a refusal and allow its admission as evidence violates due process. Moreover, under these facts, for due

process not to be violated, the officer had an affirmative duty to not mingle the *Miranda* rights with a breath test request, and where he does, to specifically inform the defendant, that the rights do not apply to that decision process.

Granted, a state legislature generally has authority to alter accepted trial procedure, and, the Texas legislature had the authority to do so in enacting the chemical test refusal evidentiary admission statute. However, as the Texas statute is *applied* to a defendant, like Petitioner herein, who requests assistance of counsel and is misled by the officer, it becomes unconstitutional and violates due process.

CONCLUSION

The Texas courts erred in not suppressing Petitioner's refusal because any proffer by the State of a *counsel request* being a refusal created an unwarranted prejudicial risk that a jury would consider the same to be an inference of guilt, and, as such violated Petitioner's federal constitutional guarantee to due process. Indeed, Petitioner's request for assistance of counsel "in the face of an accusation is an enigma and should not be determinative of [his] mental . . . [state] just as it is not determinative of one's guilt." *Greenfield*, 106 S. Ct. at 640 n.11 quoting the Fla. Sup. Court in *State v. Burwick*, 442 So.2d 944, 948 (1983).

Also, it is clearly evidenced by the fact that the officer confused and/or misled Petitioner as to the point at which his federal constitutional rights applied and thereby also violated Petitioner's due process rights.

In addition, the refusal statute *as applied* in this case wherein the refusal was premised upon, or equated to by the arresting officer, a request for assistance of counsel, is unconstitutional as the Petitioner was pigeonholed into a Hobson's trial choice. As such, it forced Petitioner to accept a probable inference of guilt from the invocation of his constitutional right (assistance of counsel) or to attempt to rebut it by introducing evidence of his request for counsel to explain the "refusal".

Accordingly, the chemical test refusal statute *as applied* in any of the above scenarios is unconstitutional as it is violative of Petitioner's due process of law rights and should be precluded from admission into evidence.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Honorable Court grant his Petition for Certiorari and reverse the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX A

Randall Hage JAMAIL, Appellant,

v.

The STATE of Texas, Appellee.

No. 768-87.

Court of Criminal Appeals of Texas,
En Banc.

March 21, 1990.

Rehearing Denied April 25, 1990.

Defendant pled nolo contendere and was convicted in the County Court at Law No. 6, Harris County, J. R. Musslewhite, J., of driving while intoxicated, and he appealed. The First Court of Appeals, Sam Bass, J., 731 S.W.2d 708, affirmed. Defendant petitioned for discretionary review. The Court of Criminal Appeals held that: (1) defendant had no right to counsel before deciding to take or refuse breath test, and admission of evidence of his refusal to submit to test on basis of his inability to contact counsel did not violate his statutory or constitutional rights, and (2) evidence of reason for defendant's refusal to take test was irrelevant and inadmissible as part of State's case, but error from admission of that evidence was harmless; and (3) defendant was not deprived of fundamental fairness on basis that police officers so mixed their request for breath/blood sample with questions that amounted to custodial interrogation that defendant was led to believe he was constitutionally entitled to consult

with attorney prior to deciding whether to submit to chemical sobriety test.

Affirmed.

Clinton, J., dissented with note.

Teague, J., dissented.

J. Gary Trichter, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., William J. Delmore, III, Mark L. Frazier, Asst. Dist. Attys., Houston, and Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON THE APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

PER CURIAM.[1]

The appellant was convicted of driving while intoxicated following his plea of nolo contendere, which was based upon a negotiated plea bargain made pursuant to and in compliance with Article 44.02, V.A.C.C.P. The trial court assessed appellant's punishment at 120 days confinement, probated for two years, and a monetary fine of $300.00. The First Court of Appeals affirmed the conviction, holding that the trial court correctly denied the appellant's motion to suppress evidence. *Jamail v. State*, 731 S.W.2d 708 (Tex. App—Houston [1st Dist.] 1987).

We granted the appellant's petition for discretionary review to determine whether the court of appeals was cor-

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1. This opinion was prepared by Judge M.P. Duncan, III, prior to his death and is adopted as the opinion of the Court.

rect in its conclusion that the trial court did not err in failing to suppress appellant's refusal to submit to the breath test. The appellant claimed that evidence of his refusal to take the breath test violated his rights to due course of law under the State Constitution and his concomitant federal right to due process of law. In addition, he claimed that such evidence was a violation of his rights to counsel under Article I, § 10, of the Texas Constitution or Article 1.05 of the Texas Code of Criminal Procedure.

[1] Specifically, and relevant to his first ground for review, the appellant claims that evidence of his refusing to take the breath test should have been suppressed because the refusal was based on his inability to consult with an attorney before refusing the test. Therefore, according to the appellant, his due process rights were breached.[2] It must be emphasized that the appellant is not arguing that his refusal to take the test is absolutely inadmissible. Rather, he is arguing that when one's refusal is predicated on the absence of requested counsel an invalid inference of guilt accompanies the evidence of the refusal. Or, as the appellant states in his brief:

> When the trial court failed to suppress Appellant's alleged refusal it effectively equated his counsel['s] request to a refusal, i.e., and inference of guilt. Such a holding by the trial court violated the Appellant's due process rights because a request for counsel cannot give rise to an inference of guilt.

After reviewing the videotape it is clear that the appellant's refusal to take the test occurred after he had repeat-

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2. The appellant requests relief under both the due process clause of the Fourteenth Amendment and the due course of law provision under Art. I, § 19 of the Texas Constitution. Both claims will be referred to as "due process."

edly attempted to contact counsel. Moreover, the State does not contend otherwise. Consequently, we will accept that the appellant's refusal to take the breath test was based entirely upon his inability to obtain an attorney's advice prior to taking the breath test.

Although the appellant's argument is both unique and intriguing we nonetheless disagree. In *South Dakota v. Neville,* 459 U.S. 553, 103 S. Ct. 916, 74 L.Ed.2d 748 (1983), the Supreme Court concluded that there was no constitutional violation attendant to the admissibility of evidence of a suspect's refusal to submit to a blood test. In 1983 the 68th Legislature revised some of the laws relating to driving while intoxicated. Consistent with the Supreme Court's holding in *South Dakota v. Neville, id.,* the Legislature authorized as admissible evidence of a defendant's refusal to take a breath of blood test. Article 6701*l*-5, § 3(g), V.A.C.S., provides:

> If the person refuses a request by an officer to give a specimen of breath or blood, whether the refusal was express or the result of an intentional failure of the person to give the specimen, that fact may be introduced into evidence at the person's trial.

Clearly, the statute does not predicate the admissibility of such evidence on a reason for the refusal. Thus, if a refusal is found to be inadmissible it must be on constitutional grounds.

In *Forte v. State,* 707 S.W.2d 89 (Tex. Cr. App. 1986) and *Forte v. State,* 759 S.W.2d 128 (Tex. Cr. App. 1988), we found that one did not have a right to counsel before he decides to take or refuse a breath test authorized under Article 6701*l*-5, V.A.C.S. Therefore, when the

appellant refused to submit to the breath test he had no statutory or constitutional right to consult counsel regarding the test. In other words, when the appellant refused to take the breath test his reason for the refusal was based upon a right he did not possess: the right to consult with counsel.

The appellant argues that the refusal to take the test, because it was based on his request for counsel, should be treated differently than a refusal based on some other reason. He argues that an inference of guilt necessarily accompanies the refusal when it is based upon a suspect's request for counsel. In *Doyle v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that it was a violation of due process to impeach a defendant's testimony with evidence of his post-arrest, post-*Miranda*[3] silence. Basically, the Court held that it was fundamentally unfair to promise a defendant that he has a right to remain silent and then violate that assurance by impeaching him when he invokes that right. In several cases that followed *Doyle* the Supreme Court distinguished the holding in *Doyle* or made exceptions to it. See *Baxter v. Palmigiano,* 425 U.S. 308, 96 S. Ct. 1551, 47 L.Ed.2d 810 (1976), *Jenkins v. Anderson,* 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), *Anderson v. Charles,* 447 U.S. 404, 100 S. Ct. 2180, 65 L.Ed. 2d 222 (1980), and *Fletcher v. Weir,* 455 U.S. 603, 102 S. Ct. 1309, 71 L.Ed.2d 490 (1982). In *Wainwright v. Greenfield,* 474 U.S. 284, 106 S. Ct. 634, 88 L.Ed.2d 623 (1986), however, the Supreme Court followed *Doyle.* In *Wainwright v. Greenfield, id.,* after the defendand was arrested for sexual battery and given his *Miranda*

3. *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

warnings he elected to remain silent and requested an attorney. At his trial, the defendant claimed insanity. During final argument the prosecutor commented on the defendant's silence after his arrest and suggested that this was consistent with sanity.

After making its way through the Florida State courts and lower federal courts the Supreme Court granted review. The Supreme Court, as previously noted, applied *Doyle* and held that even when an insanity offense is pled the State cannot comment upon a defendant's post-arrest, post-*Miranda* silence because to do so would be fundamentally unfair and a violation of due process.

The appellant cites *Wainwright v. Greenfield,* supra, in support of his argument that a similar rule should apply when a refusal to take a breath test is based upon the absence of counsel. In essence, the appellant argues that one's invocation of the right to silence and one's invocation of the right to an attorney carry the same adverse inference of guilt if such evidence is admitted at trial. We do not agree for several reasons.

First, the defendant had no right to counsel regarding the breath test. The appellant was not undergoing custodial interrogation because the breath test is not testimonial. Thus, he was not entitled to counsel under the self-incrimination clauses of either the Federal or State Constitutions. See both *Forte* cases, supra. In addition, because the proceeding had not reached the "critical stage" of the criminal process, the appellant had no right to counsel under the right to counsel provision of either the Federal or State Constitutions. *McCambridge v. State,* 778 S.W.2d 70 (Tex. Cr. App. 1989).

Second, *Doyle v. Ohio*, supra, contrary to some opinions, did not hold that an inference of guilt invariably accompanies evidence of one's silence. Instead, the Supreme Court held that once a suspect is arrested and advised he may remain silent, as required by *Miranda v. Arizona*, supra, then his invocation of that right renders the silence "insolubly ambiguous." *Doyle v. Ohio*, supra 426 U.S. at 618, 96 S. Ct. at 2245. In other words, "[s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights," *id.*, and not indicative of his guilt. Therefore, if post-*Miranda* silence does not carry the inference of guilt then one's request for counsel surely does not either.

Third, even assuming human nature and experience compel the conclusion that evidence of one's silence when confronted with allegations of moral and/or legal improprieties inexorably create an inference of guilt, we do not agree with appellant that the same inference will accompany the request for counsel. As noted, the Supreme Court in *Doyle* more or less recognized this when it stated that "every post-arrest silence is insolubly ambiguous because . . . ," *id.*, at 617, 96 S. Ct. at 2244, of the *Miranda* warnings. However, the same cannot be said of one's right to counsel. Human nature and experience do not compel the conclusion that evidence of one requesting the assistance of counsel when confronted with allegations of moral and/or legal improprieties inexorably create an inference of guilt. And, neither the Supreme Court nor this Court has so held.

In fact, the concurring opinion in *Wainwright v. Greenfield*, supra, held to the contrary. In his concurring opinion, then-Justice Rehnquist criticizes the court of appeals'

opinion that "expanded *Doyle* to cover not mere silence, but requests for counsel. . . ." *Id.* 474 U.S. at 296, 106 S.Ct. at 641. The concurring opinion recognizes that because one's post-*Miranda* silence is by its nature "insolubly ambiguous," ("the defendant may be indicating he has nothing to say in his defense, or he may be relying on the assurance that he has a right to remain silent," *id.* at 297, 106 S. Ct. at 641) such evidence has no probative value. As the concurring opinion further observes:

> Similarly, a request for a lawyer has essentially no probative value where the question is one of guilt or innocence: No sensible person would draw an inference of guilt from a defendant's request for a lawyer after he had been told he had a right to consult one; it is simply not true that only a guilty person would want to have a lawyer present when being questioned by the police.

Id. at 297, 106 S. Ct. at 641-42.

We agree with such observations. Evidence that the appellant based his refusal to submit to the breath test on his request for an attorney does not infer his guilt.

[2] In addition to his complaint that evidence of his request for an attorney carries an inference of guilt, the appellant also claims somewhat contradictorily that such evidence has no probative value. We do agree with this. Thus under Rule 402, *Tex. R. Cr. Evid.* such evidence should not have been admissible by the State because it was not relevant. That is, as stated previously, under the statute why one refuses to take the breath test is irrelevant to the State's case. Thus, as a technical matter such evidence was not admissible. However, this does not compel

a reversal of the appellant's conviction because inasmuch as the evidence had no probative value we have no difficulty in concluding beyond a reasonable doubt that it did not contribute to the appellant's conviction or punishment.[4] Rule 81(b)(2), *Tex. R. App. Proc.*

Moreover, as a practical matter, from a defendant's position such evidence could be relevant and thus have probative value because it would tend to prove that his mental and physical state was such that he could think clearly enough to recognize he needed the assistance of a lawyer. Thus, although evidence that one based his refusal to submit to a breath test upon the failure to consult with counsel is not relevant to why he refused to take the test, it would be relevant to a defendant's claim that he was not intoxicated. In addition, such evidence would also be relevant and admissible to rebut the inference of guilt that does accompany evidence of one's refusal to submit to the breath test.

Consequently, the reason one refuses to submit to a breath test is irrelevant and inadmissible as a part of the State's case. Conversely, it would be relevant and admissible as a part of the defendant's case.

Accordingly, this portion of appellant's first ground for review is denied.

[3] This leads us to the second prong of appellant's due process or due course of law claim: that he was deprived of fundamental fairness because the police officers so mixed their request for a breath/blood sample with questions that amounted to custodial interrogation that

---

4. Furthermore, the appellant's punishment was assessed pursuant to a plea bargain agreement. Thus, it is virtually impossible that the error contributed to the punishment.

appellant was led to believe that he was constitutionally entitled to consult with an attorney prior to deciding whether to submit to the chemical sobriety test. See *McCambridge v. State*, 712 S.W.2d 499, 506, n. 17 (Tex. Cr. App. 1986). The court of appeals disposed of this contention by concluding that it was of no merit because ". . . no testimony was presented at the suppression hearing that appellant was confused or misled by the police officers." *Jamail v. State*, supra, at 712. While the court of appeals reached the correct result it is our belief that it did not adequately address the grounds raised by appellant as there was sufficient evidence introduced at the plea to make a determination on the merits.

Viewing the videotape, which was introduced by the State, there is no question that appellant, after having been given his *Miranda* warnings by Officer Self upon entry into the videotape room, sought to terminate the entire videotape interview consisting of the initial warnings, a battery of motor skill examinations, an attempted interview concerning the offense and a request to submit to the breath test after being advised of his statutory warnings pursuant to Art. 6701*l*-5, § 2(b), supra. During his entire stay in the videotape room, appellant requested counsel several times and emphatically refused to submit to the breath test without first consulting with an attorney. It must be observed that the gravamen of appellant's complaint in this instance is not that he desired counsel prior to making a decision regarding the breath test but that the conduct or actions of the police officers confused or misled him to such an extent and to such a degree that he mistakenly believed that he was entitled to consult with an attorney prior to making his decision whether to submit to the breath test.

The videotape reveals that Officer Self specifically stressed to appellant that the *Miranda* warnings administered applied only to a custodial interrogation situation and could be invoked to questions asked relating to the offense. We can find nothing in the record, including the videotape, which suggest that the appellant was led to believe that he was entitled to consult with an attorney prior to submitting or refusing to take the breath test. The record indicates only that appellant desired to consult with counsel prior to submitting to the chemical sobriety test, not that the officer's actions or comments fostered or manifested an ambiguity regarding the appellant's constitutional right to the presence of an attorney. *Jamail v. State*, 787 S.W.2d 372 (Tex. Cr. App. 1990). Therefore, this aspect of appellant's first ground for review is overruled.

Finally, in his last two grounds for review the appellant complains that the refusal to submit to the chemical sobriety test should have been suppressed as it was a fruit of a violation of his right to counsel under Art. I, § 10 of the Texas Constitution and Article 1.05 of the Texas Code of Criminal Procedure. This Court has previously decided that no such right emanates from either provision at the time one is requested to submit to a chemical sobriety test; therefore, these grounds for review are likewise overruled. *Forte v. State*, supra; *McCambridge v. State*, 778 S.W.2d 70 (Tex. Cr. App. 1989) (Opinion on Remand).

Accordingly, the judgment of the court of appeals is affirmed.

CLINTON, J., dissents, and adheres to views previously expressed in *Forte* and *McCambridge*.

TEAGUE, J., dissents.

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 25, 1990

RE: Case No. 0768-87

STYLE: Jamail, Randall Hage

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

J. Gary Trichter
3500 Travis
Houston, TX 77002

APPENDIX C

Randall Haige JAMAIL, Appellant

v.

The STATE of Texas, Appellee.

No. 01-86-0727-CR.

Court of Appeals of Texas,
Houston (1st Dist.)

May 21, 1987.

Rehearing Overruled June 4, 1987.

Defendant was convicted of driving while intoxicated, pursuant to plea of nolo contendere after suppression motion was overruled by County Court No. 6, Harris County, J. R. Musslewhite, J., and he appealed. The Court of Appeals, Sam Bass, J., held that: (1) failure to suppress evidence of defendant's refusal to take a breath-alcohol test was not violation of his right to assistance of counsel; (2) statute requiring arrestee to be taken before magistrate without unnecessary delay does not preclude breath testing before taking arrestee before magistrate: (3) refusal to suppress the refusal did not violate due process; and (4) record failed to establish that defendant failed to receive the required written warnings.

Affirmed.

Levy, J., filed dissenting opinion.

J. Gary Trichter, Houston, for appellant.

John B. Holmes, Jr. Harris County Dist. Atty., William J. Delmore, III, Mark L. Frazier Harris County Asst. Dist. Attys., Houston, for appellee.

OPINION

Before SAM BASS, DUGGAN and LEVY, JJ.

SAM BASS, Justice.

This is an appeal from a conviction for driving while intoxicated. After the appellant's motion to suppress evidence was overruled, he entered a plea of nolo contendere. Pursuant to a negotiated plea bargain, the court assessed appellant's punishment at 120 days confinement, probated for two years, and a $300 fine. This appeal is focused upon the trial court's denial of appellant's motion to suppress.

Appellant brings nine points of error. Appellant's first three points of error contend that the trial court erred in not suppressing appellant's refusal to submit to a breath-alcohol test as the fruit of an unreasonable seizure. Appellant's first point of error is based on the fourth amendment of the United States Constitution, the second point of error is based on article 1 § 9 of the Texas Constitution, and the third point of error is based on article 1.06 of the Texas Code of Criminal Procedure. (Vernon 1977). Appellant contends that a motion to suppress was properly presented to the trial court urging that the appellant was unreasonably arrested absent proper judicial authorization of any exception to the warrant requirement. Appellant further argues that the State offered no evidence to justify appellant's seizure. Appellant argues that where

a defendant properly presents a motion to suppress complaining of an illegal seizure, the burden of proof shifts to the State to establish the legality of the seizure.

[1] Appellant ignores his initial burden of proving that he was subjected to a warrantless seizure. In *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex. Crim. App. 1986), the court stated:

> When a defendant seeks to suppress evidence on the basis of a Fourth Amendment violation, this Court has placed the burden of proof initially upon the defendant. *Mattei v. State*, 455 S.W.2d 761, 765-66 (Tex. Cr. App. 1970). As the movant in a motion to suppress evidence, a defendant must produce evidence that defeats the presumption of proper police conduct and therefore shifts the burden of proof to the State. *Id.*, relying upon *United States v. Thompson*, 421 F.2d 373, 377 (5th Cir. 1970) and *Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964), cert. denied, 379 U.S. 916, 85 S. Ct. 265, 13 L.Ed. 2d 186. Cf. *United States v. Bachner*, 706 F.2d 1121, 1125-26 (11 Cir. 1983). A defendant meets his initial burden of proof by establishing that a search or seizure occurred with a warrant. *Mattei*, supra, at 766, quoting *Rogers v. United States*, 330 F.2d at 542.
>
> Once a defendant has established 1) that a search or seizure occurred and 2) that no warrant was obtained, the burden of proof shifts to the State. *Id.*

(Footnotes omitted.)

In this case, appellant failed to meet the initial burden of proof. Appellant did not produce any evidence established that a seizure occurred without a warrant. No witnesses for the appellant or the State testified at the

suppression hearing. The only evidence presented at the suppression hearing was the videotape, which was admitted into evidence at the hearing. The circumstances surrounding the alleged seizure do not appear in the record. Because appellant failed to produce evidence that established that a seizure occurred without a warrant, the burden of proof never shifted to the State.

Appellant's first, second, and third points of error are overruled.

[2] Appellant's fourth and fifth points of error contend that the trial court erred in not suppressing evidence of appellant's refusal to take a breath-alcohol test because it was the fruit of a violation of his right to assistance of counsel under article 1, § 10 of the Texas Constitution and its statutory analogue, Tex. Code Crim. P. Ann. art. 1.05 (Vernon 1977).

In *Foster v. State*, 713 S.W.2d 789 (Tex. App.—Houston [1st Dist.] 1986, pet. granted), this Court noted that article 1, § 10 of the Texas Constitution and article 1.05 "provide only that the defendant has a right to counsel, and does not specifically delineate when this right attaches." In *Foster*, this Court held that the defendant's right to counsel based upon the Texas Constitution was not violated at the time of a lineup because no formal adversarial judicial proceedings had commenced against the defendant. We observed that he were "unable to find any basis upon which to interpret our State Constitution's right-to-counsel provision as giving a criminal defendant any greater protection than is given by the United States Constitution." 713 S.W.2d at 790.

In *Ramirez v. State*, 721 S.W.2d 490 (Tex. App.—Houston [1st Dist.] 1986, pet. granted), this Court noted

that the Court of Criminal Appeals has held that the right to counsel under the sixth amendment attaches only upon or after the filing of a complaint and information against a DWI arrestee, *Forte v. State*, 707 S.W.2d 89, 91 (Tex. Crim. App. 1986), and held that the Texas Constitution's provision for the right to counsel affords an accused no greater protection than that given by the United States Constitution's corresponding provision.

In *McCambridge v. State*, 725 S.W.2d 418 (Tex. App. —Houston [1st Dist.] 1987, pet. filed) (on remand) (*McCambridge III*) this Court again addressed in a DWI case the issue of whether article 1, section 10 of the Texas Constitution affords greater protection than does the sixth amendment. After noting our rulings in *Foster* and *Ramirez*, we chose not to depart from those holdings.

We adhere to our holdings in *Foster*, *Ramirez*, and *McCambridge*. Appellant's fourth and fifth points of error are overruled.

[3] Appellant's sixth point of error contends that the trial court erred in not suppressing appellant's refusal to submit to an intoxilyzer test, as it was the fruit of a violation of the right to assistance of counsel under Tex. Code Crim. P. Ann. art. 15.-17(a) (Vernon Supp. 1987).

Article 15.71(a) provides:

> In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his

> right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall allow the person arrested reasonable time and opportunity to consult counsel and shall admit the person arrested to bail if allowed by law.

Article 15.17(a) only requires that an arrestee be taken before a magistrate "without unnecessary delay." The court in *Sanders v. City of Houston*, 543 F.Supp. 694, 705 (S.D. Tex. 1982), *aff'd*, 741 F.2d 1379 (5th Cir. 1984), held that article 15.17 allows a person who is arrested on probable cause to be held for a brief period in order that the police officers may accomplish necessary administrative tasks incident to arrest. The State asserts, and we agree, that "necessary administrative tasks incident to arrest" would include breath testing in the case of a driving while intoxicated suspect.

,[4] The express terms of article 15.17 require only that the "magistrate shall allow the person arrested reasonable time and opportunity to consult counsel." Article 15.17 does not grant an arrestee the right to counsel *before* the arrestee is taken before the magistrate nor does article 15.17 grant an accused the right to counsel during a breath test taken prior to the time the accused is taken before a magistrate.

Appellant's sixth point of error is overruled.

[5] Appellant's seventh point of error contends that the trial court erred in not suppressing appellant's refusal to submit to the intoxilyzer test because it was the product of a violation of his right to assistance of counsel under Tex. Code Crim. P. Ann. art. 38.22, sec. 3(a)(2) (Vernon Supp. 1987).

Article 38.22(3)(a)(2) provides:

> No oral or sign language statement of an accused made as a result of *custodial interrogation* shall be admissible against the accused in a criminal proceeding unless:
>
> * * * * * *
>
> Prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(Emphasis added.)

Article 38.22, section 3(a)(2) provides that an accused's statement "made as a result of custodial interrogation" is inadmissible against the accused in a criminal proceeding unless the accused receives the warning in article 38.22, section 2(a), prior to giving his statement. In *McGinty v. State*, 723 S.W.2d 719 (Tex. Crim. App. 1986), the court held that a police officer's inquiry of whether the suspect would take a blood-alcohol test was not an interrogation. The defendant's "refusal to submit to the breathalyzer test did not result from a costodial interrogation" for purposes of article 38.22. *Id.* The court in *Bass v. State*, 723 S.W.2d 687 (Tex. Crim. App. 1986), also held that the police inquiry of whether the

suspect would take a blood alcohol test is not an interrogation for purposes of article 38.22. *See also Gressett v. State,* 723 S.W.2d 695 (Tex. Crim. App. 1986) ("We hold that the refusal of appellant . . . to submit to the breathalyzer test did not come about as the result of 'custodial interrogation' for purposes of Article 38.22.")

Because appellant's refusal to submit to the breath-alcohol test was not the result of "custodial interrogation," evidence of such a refusal would not be inadmissible under article 38.22.

Appellant's seventh point of error is overruled.

[6] Appellant's eighth point of error contends that the trial court erred in not suppressing appellant's refusal to take a breath-alcohol test because the admission of such refusal would violate appellant's right to due course of law under the Texas Constitution and his federal right to due process of law. In *McCambridge III,* this Court rejected similar arguments challenging the failure to suppress the results of a breathalcohol test.

[7] Appellant asserts that the trial court's failure to suppress his refusal effectively equated his requests for counsel to a refusal. Appellant argues that such a holding by the trial court violated his due process rights because a request for counsel cannot give rise to an inference of guilt. Appellant further argues that a refusal to submit to chemical testing, premised upon a counsel request, has no probative value.

The fact that appellant premised his refusal upon a counsel request is irrelevant: appellant had no right to counsel at the time of his requests under *McCambridge v. State,* 712 S.W.2d 499 (Tex. Crim. App. 1986) (*Mc-*

Cambridge II), and *McCambridge III*. Moreover, Tex. Rev. Civ. State. Ann. art. 6701*l*-5(3)(g) expressly authorizes the introduction of a refusal to provide a breath specimen.

[8] Appellant also asserts that, under what the appellant calls the Commingled [sic] Miranda Doctrine or the Confusion Doctrine, appellant was misled or confused by the police officer's Miranda warning, which is not applicable to a breath test request. In *McCambridge II,* the Court of Criminal Appeals noted that its holding did not imply "that a remedy will never be available to a suspect who is confused when faced with *Miranda* warnings and a breath testing decision without the benefit of requested counsel." 712 S.W.2d at 507, n.18. However, no testimony was presented at the suppression hearing that appellant was confused or misled by the police officers.

Appellant's eighth point of error is overruled.

[9] Appellant's ninth point of error contends that the trial court erred in not suppressing appellant's refusal to take a breath test because its admission would violate Tex. Code Crim. P. Ann. art. 38.23 (Vernon 1979), since the test request was not made subject to the mandatory provisions of Tex. Rev. Civ. Stat. Ann. art. 6701*l*-5, section 1 and section 2(b).

Article 6701*l*-5, section 1 provides:

> Section 1. Any person who operates a motor vehicle upon the public highways or upon a public beach in this state shall be deemed to have given consent, subject to the provisions of this Act, to submit to the taking of one or more specimens of his breath or blood for the purpose of analysis to determine

the alcohol concentration or the presence in his body of a controlled substance or drug if arrested for any offense arising out of acts alleged to have been committed while a person was driving or in actual physical control of a motor vehicle while intoxicated. Any person so arrested may consent to the giving of any other type of specimen to determine his alcohol concentration, but he shall not be deemed, solely on the basis of his operation of a motor vehicle upon the public highways or upon a public beach in this state, to have given consent to give any type of specimen other than a specimen of his breath or blood. The specimen, or specimens, shall be taken at the request of a peace officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the public highways or upon a public beach in this state while intoxicated.

Article 6701*l*-5, section 2(b) provides:

(b) before requesting a person to give a specimen, the officer shall inform the person orally and in writing that if the person refuses to give the specimen, that refusal may be admissible in a subsequent prosecution, and that the person's license, permit, or privilege to operate a motor vehicle will be automatically suspended for 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently prosecuted as a result of the arrest. If the officer determines that the person is a resident without a license or permit to operate a motor vehicle in this state, the officer shall inform the person that the Texas Department of Public Safety shall deny to the person the issuance of a license or permit for a period of 90 days after the date of adjournment of the hearing provided for in Subsection (f) of this section, whether or not the person is subsequently

> prosecuted as a result of the arrest. The officer shall inform the person that the person has a right to a hearing on suspension or denial if, not later than the 20th day after the date on which the notice of suspension or denial is received, the department receives a written demand that the hearing be held.

Article 6701*l*-5, section 3(g) provides:

> If the person refuses a request by an officer to give a specimen of breath or blood, whether the refusal was express or the result of an intentional failure of the person to give the specimen, that fact may be introduced into evidence at the person's trial.

The transcript of the videotape provided by appellant states that "Officer Self orally informs appellant of the DWI statutory warning on breath test refusal." Appellant, however, has failed to sustain his burden of proof by showing that he did not also receive a written warning. As noted above, appellant did not testify at the hearing on the motion; the videotape by itself is insufficient to prove that appellant did not receive a written warning. As the State notes, the appellant could have been requested to take a breath test after receiving written warnings of the statutory consequences for a failure to comply, immediately after the conclusion of the videotaped portion of the investigation.

Appellant has failed to show non-compliance with the requirements of Article 6701*l*-5.

Appellant's ninth point of error is overruled.

The judgment is affirmed.

LEVY, J., dissents.

OPINION

LEVY, Justice, dissenting.

I dissent because, as stated more fully in my dissenting opinion in *Ramirez v. State*, 721 S.W.2d 490, 491 (Tex. App.—Houston [1st Dist.] 1986, pet. granted), implicit in the constitutional right to counsel is the assurance that the right, to be effective, will be available *when needed*. If the *right* to the assistance of counsel is shaped by the *need* for such assistance, as I believe it is, then logic requires that the right attach not merely during trial, but rather at the earlier stages in the criminal justice process where critical events might well settle the accused's fate and reduce the trial itself to a mere formality. *See Maine v. Moulton*, 474 U.S. 159, 106 S. Ct. 477, 88 L.Ed.2d 481 (1985). In my view, the earliest critical stage probably occurs when police attention begins to focus on the accused for the purpose of initiating criminal charges against him. Thus, I would sustain appellant's fourth and fifth points of error. See Tex. Const. art. 1, 10; Tex. Code Crim. P. Ann. art. 1.05 (Vernon 1977).

Further, I disagree with the majority's disposition of the sixth through ninth points of error. In these points, the appellant contends that the trial court erred in not suppressing evidence of his refusal to submit to the intoxilyzer test because it was the product of a violation of his right to the assistance of counsel under various federal and state constitutional and statutory provisions.

Several court decisions, perhaps the most explicit of which is *Dudley v. State*, 548 S.W.2d 706 (Tex. Crim. App. 1977), prohibiting the State from eliciting testimony concerning an accused's refusal to take a sobriety test,

have rested upon Tex. Code Crim. P. Ann. art. 38.22 (Vernon Supp. 1987), the "confession statute," as well as the rule of evidence that forbids an accused's silence to be used against him as tending to establish guilt. *See Cardwell v. State,* 156 Tex. Cr. R. 457, 243 S.W.2d 702 (1951) (op. on reh'g).

When a police officer is permitted to testify that an accused has exercised his right of refusal or his right of silence, the accused is thereby discredited before the jury, which is precisely what the self-incrimination statute prohibits. The privilege against self-incrimination is thus belittled and further eroded. Both reason and *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), suggest that the constitutional right to remain silent in the face of accusation carries with it the assurance that such silence will not result in any penalty. *Doyle v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976). In 1983, the U.S. Supreme Court reaffirmed its determination that federal courts could not use such silence for impeachment because of its dubious probative value, and reconfirmed its application to the states because of the "fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *South Dakota v. Neville,* 459 U.S. 553, 564-5, 103 S. Ct. 916, 922-3, 74 L.Ed.2d 748 (1983). The Court, however, distinguished the right of refusal from the right of silence, declaring that the right to refuse the sobriety test was a matter of grace bestowed by South Dakota and that warnings attached to such right contained no "misleading implicit assurances (to the suspect) as to the relative consequences of his choice." *Id.* at 565, 103 S. Ct. at 923.

When a defendant verbally refuses to submit to a chemical test for intoxication, he is testifying against himself and this is clearly "testimonial evidence." I would hold that evidence of refusal or of silence is a by-product of the compulsion to take the test, testimonial in nature, and constitutes compulsory self-incrimination in violation of article 38.22. *Cardwell v. State*, 156 Tex. Crim. at 457, 243 S.W.2d at 704.

For these reasons, I would also sustain appellant's sixth through ninth points of error, reverse the judgment of conviction, and remand the cause for a new trial.

APPENDIX D

PARAPHRASED TRANSCRIPT OF VIDEOTAPE

The videotape reflects that the recording was started May 30, 1986, approximately 21:37:15 hours (military time for 9:37 p.m. and 15 seconds). It ends approximately 21:56:47 hours (9:56 p.m.). The total play time of the recording is approximately 19 minutes. During the taping, the following paraphrased facts occurred at the approximate times listed:

21:37:15 Appellant and Officer Self, of the West University Police Department, enter the video room.

21:37:35 Officer Self informs Appellant that everything he says or does is being electronically recorded.

21:37:46 Officer Self begins to inform Appellant of his right to remain silent.

21:37:59 Appellant requests to terminate the video interview but the officer continues on.

21:38:05 Officer Self further informs Appellant of his right to have an attorney present during the interview, his right to appointed counsel, and of his right to terminate the interview.

21:38:17 *Officer Self specifically informs Appellant that he can only invoke the above rights when he asks questions relating to the crime. Officer Self walks to the upper far portion of the room and points to writing on the wall, left side, and tells Appellant his rights only apply here.*

21:38:35 Appellant for the second time requests to terminate the interview but the Officer re-

sponds saying he will still continue the questioning.

21:38:40 Appellant for the third time requests to terminate the interview and for the first time requests to call an attorney.

21:38:47 Officer Self tells Appellant he can use the telephone in the video room to call an attorney.

21:39:06 Appellant says he will not call an attorney in the video room because of the electronic recording; he requests an opportunity to call an attorney in private.

21:39:15 Officer Self says he cannot leave Appellant alone in the video room.

21:39:28 Appellant states he will call an attorney. Officer Self tells Appellant if he can reach an attorney that he has only thirty minutes to come to the Bellaire Police Department.

21:42:26 Appellant, having tried unsuccessfully to telephone counsel, hangs up the telephone.

21:42:36 Officer elf reconvenes the interview and requests Appellant to participate in a demontration of his motor skills.

21:43:03 Appellant for the fourth time requests to terminate the interview.

21:43:12 Officer Self again continues to question Appellant.

21:43:14 Appellant for the fifth time requests to terminate the interview.

21:43:14 Appellant for the second time requests to telephone counsel; he asks for a private conversation and tells the officer he cannot have any privacy if he is in the room (second attorney request).

21:44:18 Appellant again tells the officer that he desires to contact his lawyer and speak to him privately (third attorney request).

21:44:50 Officer Self reminds Appellant that even if he left the room the electronic recording would still continue.

21:44:56 Appellant makes his fourth request to contact an attorney in private.

21:45:00 The officer continues the questioning and states that he will allow Appellant to perform the motor skills test if he wants to.

21:45:50 Appelant tells Officer Self he is not refusing anything and that he desires to have his attorney present (fifth attorney request).

21:46:30 Appellant ostensibly acquiesces to police authority and says he is at mercy of the officer and will do anything he wants.

21:47:00 Appellant says he will not cooperate without an attorney present.

21:47:20 *Officer Self tells Appellant that by his actions he is refusing.*

21:47:30 Officer Self tells Appellant to leave a message for his lawyer and if he returns the call then he would redo the taping; if the attorney can arrive at the Bellaire Police Department within thirty minutes.

21:48:13 Appellant voices his desire to try again to contact an attorney (sixth attorney request).

21:48:20 Officer Self informs Appellant that he will leave room if an attorney is reached. Appellant again attempts to use the telephone to contact an attorney.

21:50:12 Appellant, unable to reach an attorney, hangs up the telephone.

21:50:25 Officer Self continues his interview requesting Appelant to demonstrate a leg lift.

21:50:27 Appellant requests for the sixth time to terminate the interview.

21:50:39 Officer Self requests Appellant to perform a back-head tilt demonstration.

21:50:40 Appellant requests an attorney present (seventh request).

21:50:47 *Officer Self again suggests that Appellant's requests for an attorney are refusals. Appellant states that he is not refusing but wants an attorney present (eighth attorney request).*

21:50:55 Officer Self continues the interview and requests Appellant to perform an index finger to nose motor skill demonstration.

21:51:10 Appellant submits to the Officer's request. He makes multiple attorney requests while performing the exercise.

21:51:33 Officer Self directs Appellant to perform a line walk demonstration.

21:51:38 Appellant walks the line and makes multiple attorney requests while doing so.

21:52:00 Appellant requests a chance to telephone his father and mother.

21:52:15 Officer Self continues the interview and requests Appellant to demonstrate his reading aloud skills.

21:52:20 Appellant makes second request to call his mother and father; he says he wants an attorney.

21:52:37 *Officer Self tells Appellant he wants to ask him questions that are directly related to the crime of DWI—the officer again points out*

the upper left wall writing he earlier made reference to 21:38:17.

21:52:40 Appellant says he wants an attorney and will not answer and Officer Self states Appellant need not answer if he does not want to.

21:52:42 Appellant says he wants to exercise his constitutional rights and not answer questions (seventh request to terminate).

21:53:00 *Officer Self asks Appellant to submit to a breath test and Appellant responds "No, not without an opportunity to call an attorney."*

21:53:07 Officer Self *orally* informs Appellant of the DWI statutory warning on breath test refusal.

21:54 Appellant says he did his best to provide a sample but was denied any opportunity to do so. Officer Self tells Appellant this is the first time he has been requested to provide a breath specimen.

21:55:13 Appellant agrees to take a breath test if he will not be physically harmed again. Officer Self again requests Appellant to take a breath test.

21:55:23 Appellant responds he will not take the test if he will be beat up again and tells the officer to place him in jail.

21:55:18 Officer Self asks again if he will take a breath test and Appellant responds he would if the officer would agree.

21:56:30 Officer Self asks again if he will take the breath test and Appellant responds "only if you will not hit me again."

21:56:47 The officer writes on paper and thereafter hands a folded paper to Appellant. Appellant and the officer walk out of the video room and the tape ends.